McKenzie Engineering Co. *and* Carpenters Local Union 410, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 33–CA–11408

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND BRAME

On July 7, 1997, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a brief, the General Counsel filed a brief in support of the administrative law judge's decision and an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set out in full below.[2]

The judge found, and we agree, that the Respondent repudiated its collective-bargaining agreement with the Union, in violation of Section 8(a)(5) and (1) of the Act. The Respondent excepts to the judge's additional finding that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union. The Respondent points out that the complaint in this proceeding contained no allegation of an unlawful withdrawal of recognition. The General Counsel, in his answering brief, urges the Board to adopt the judge's finding. The General Counsel contends that this violation stems from the same conduct as the repudiation of the collective-bargaining agreement that was alleged in the complaint and found by the judge, and only involves a different theory under Section 8(a)(5). Although we agree with the judge's underlying factual finding that the conduct found unlawful in this proceeding stemmed from the Respondent's intent to rid itself of the Union, we do not adopt his finding of an additional violation based on the unalleged withdrawal of recognition.[3]

ORDER

The National Labor Relations Board orders that the Respondent, McKenzie Engineering Co., Fort Madison, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Offering to pay any employee above-scale wages if that employee will refrain from joining Carpenters Local Union 410, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, or any other labor organization; urging by word or action any employee to refrain from joining the Union or any other labor organization during the term of a collective-bargaining contract with that labor organization; offering an amount of money to an employee if that employee will withdraw membership in the Union or any other labor organization; presenting any employee with an insurance or other benefit plan as an alternative to plans provided by the Union or any other labor organization to persuade that employee to refrain from joining or supporting that labor organization during the term of a collective-bargaining contract with that labor organization; and threatening that it will have to go nonunion or intends to go nonunion.

(b) Discharging or otherwise discriminating against Donald Patterson, Mark Spiekermeier, Steven Perry, and Fred Arnold Jr., or any other employee, because of support for or activity on behalf of the Union, or because such discharge or other discrimination is part of an overall plan to repudiate its collective-bargaining agreement with the Union.

(c) Repudiating and failing to honor the collective-bargaining contract with the Union as the exclusive collective-bargaining representative of employees in the following unit, during the term of the contract and any automatic extensions thereof:

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge's finding that the Respondent discharged employees Donald Patterson, Mark Spiekermeier, Steven Perry, and Fred Arnold Jr. based on their membership in the Union. In so doing, we find it unnecessary to pass on the judge's speculation that the Respondent was concerned about its profit margin on the icebreaker project.

We grant the General Counsel's motion to correct the judge's decision.

[2] We shall modify the judge's recommended Order to include a narrow cease-and-desist provision, which we find sufficient in the circumstances of this case.

Chairman Gould would adopt the judge's recommendation that the order include a broad cease-and-desist provision.

[3] In deleting the separate finding of a withdrawal of recognition and the corresponding provisions of the Order, Chairman Gould and Member Fox note that, by ordering the Respondent to cease and desist from repudiating and failing to adhere to the contract, and by directing it, affirmatively, to honor that contract and any automatic renewal or extension of it, the Board implicitly orders the Respondent to grant the extent of recognition that is owed to a collective-bargaining representative in an 8(f) relationship. See *John Deklewa & Sons*, 282 NLRB 1375, 1387 (1987) (enforceable recognitional obligation imposed on employer in an 8(f) relationship is "coextensive with the bargaining agreement that is the source of [the union's] exclusive representational authority").

In agreeing with his colleagues not to adopt the judge concerning withdrawal of recognition, Member Brame relies only on the General Counsel's failure to allege such a withdrawal in the complaint.

We find that the General Counsel's failure to allege an unlawful withdrawal of recognition is not adequately cured by his motion to amend the complaint, made for the first time in his answering brief to the Board. We therefore deny the motion.

All journeymen and apprentice carpenters employed by McKenzie Engineering Co., in the following Iowa counties: Des Moines, Henry, Lee, and Louisa south of thIowa River, and the following Missouri counties: Clark, and the eastern one-half of Scotland; excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor the collective-bargaining contract with the Union, and any automatic renewal or extension of it, including paying contractual wage rates, making contractually required contributions to fringe benefit funds, making dues deductions pursuant to checkoff authorizations and remitting amounts deducted to the Union, and complying with all other terms for all employees in the bargaining unit.

(b) On request of the Union, rescind all changes in terms and conditions of employment for bargaining unit employees made on and after November 1, 1995, and make whole all employees, the Union, and fringe benefit funds, with interest, for any losses they may have suffered as a result of the failure to honor the collective-bargaining agreement, and any automatic renewal or extension of it, in the manner prescribed in the remedy section of the decision.

(c) Within 14 days from the date of this Order, offer Donald Patterson, Mark Spiekermeier, Steven Perry, and Fred Arnold Jr. full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Make Donald Patterson, Mark Spiekermeier, Steven Perry, and Fred Arnold Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Fort Madison, Iowa facility, and at all locations where bargaining unit employees are working, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 1995.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT offer to pay employees above-scale wages if they refrain from joining Carpenters Local Union 410, United Brotherhood of Carpenters and Joiners, of America, AFL–CIO, or any other labor organization.

WE WILL NOT, by word or action, urge employees to refrain from joining the Union or any other labor organization during the term of the collective-bargaining agreement with that labor organization.

WE WILL NOT offer to pay employees an amount of money if they will withdraw from the Union or any other labor organization.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT present employees with an insurance or other benefit plan as an alternative to the one(s) provided by the Union or any other labor organization to persuade them to refrain from joining or supporting that labor organization during the term of a collective-bargaining agreement to which we are party with that labor organization.

WE WILL NOT threaten that we will have to go nonunion or intend to go nonunion.

WE WILL NOT discharge or otherwise discriminate against Donald Patterson, Mark Spiekermeier, Steven Perry, and Fred Arnold Jr., or any other employee, because of support for or activity on behalf of the Union, or because such discharge or other discrimination is part of an overall plan to repudiate our collective-bargaining agreement with the Union.

WE WILL NOT repudiate and fail to honor our collective-bargaining contract with the Union as the exclusive collective-bargaining representative of employees in the following unit during the term of the contract and any automatic extension thereof:

> All journeymen and apprentice carpenters employed by McKenzie Engineering Co., in the following Iowa counties: Des Moines, Henry, Lee, and Louisa south of the Iowa River, and the following Missouri counties: Clark, and the eastern one-half of Scotland; excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor our collective-bargaining contract with the Union, and any automatic renewal or extension of it, including paying contractual wage rates, making contractually-required contributions to fringe benefit funds, making dues deductions pursuant to checkoff authorizations and remitting amounts deducted to the Union, and complying with all other terms for all employees in the bargaining unit.

WE WILL, on request of the Union, rescind all changes in terms and conditions of employment for bargaining unit employees made on and after November 1, 1995, and make whole all employees, the Union, and fringe benefit funds, with interest, for any losses they may have suffered as a result of our failure to honor the collective-bargaining agreement, and any automatic renewal or extension of it.

WE WILL, within 14 days from the date of the Board's Order, offer Donald Patterson, Mark Spiekermeier, Steven Perry, and Fred Arnold Jr. full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Donald Patterson, Mark Spiekermeier, Steven Perry, and Fred Arnold Jr. whole for any loss of earnings and other benefits suffered as a result of their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and, WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

MCKENZIE ENGINEERING CO.

I. Poltz, Esq., for the General Counsel.
Keith J. Braskich (Keck, Mahin & Cate), of Peoria, Illinois, for the Respondent.
Marc M. Pekay, of Chicago *Judith T.*, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Fort Madison, Iowa, on December 3 through 6, 1996. On March 28, 1996, the Regional Director for Region 33 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on December 1, 1995,[1] alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs which were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

This case presents several issues arising from events transpiring in connection with rehabilitation of an icebreaker structure located on the Mississippi River, off the Iowa shore. First, several statements and actions are alleged to have constituted interference with, restraint, and coercion of employees in the exercise of their statutory rights, in violation of Section 8(a)(1) of the Act. Second, four employees were discharged on November 1. It is alleged that those discharges had been motivated by those employees' assistance of a union, by their involvement in concerted activities protected by the Act, and to discourage employees from engaging in such activities, in violation of Section 8(a)(3) and (1) of the Act.

Finally, it is alleged that the discharged employees had been covered by a collective-bargaining contract with a union which had been their bargaining agent. In conjunction with their terminations, it is alleged that the employer repudiated that contract and withdrew recognition of that union as the bargaining agent of the employer's employees. Subsequently, it is further alleged, the employer ignored both the union and the collective-bargaining contract, establishing and maintaining terms and conditions of employment without regard to what the contract

[1] Unless stated otherwise, all dates occurred during 1995.

specified and without regard to its statutory bargaining obligation. All of the foregoing bargaining-related conduct is alleged to have violated Sections 8(a)(5) and (1) of the Act.

Those allegations do not lie uncontested. It is contended that nothing had been said or done which interfered with, restrained, or coerced employees in the exercise of their statutory rights. It is further contended that the discharges had been motivated by nothing more than unsatisfactory work-related conduct on November 1, occurring against a background of ongoing difficulties with the work of employees dispatched by the union with which the employer had a collective-bargaining contract. As to the bargaining-related allegations, it is contended principally that the contract, and its underlying bargaining obligation, never applied to the icebreaker structure project involved in this proceeding and, in any event, no effort was made by the union to pursue any remedy for violation of the contract through its disputes resolution procedures, nor had the union satisfactorily performed its obligations under that contract and, finally, employees could be obtained from other sources under Iowa's "Right to Work" laws.

For the reasons discussed post, I reject those defenses and conclude that a preponderance of the credible evidence supports the complaint's allegations. Essentially, the situation here is one where an employer, whose employees have been represented by a union, had been expressing concern about being disadvantaged because its employees were unionized while those of its competitors were not. That employer successfully underbid competitors for a particular project, but its success was based on a bid that left it with a relatively narrow profit margin. As work on that project progressed, the employer became even less satisfied with the union situation and made an effort to persuade one employee not to choose representation by that union. Ultimately, the employer took action to eliminate what it viewed as the higher costs and inconvenience of its unionized situation: it seized upon certain events as a pretext for firing almost all of the union-represented employees, while renewing efforts to persuade the remaining unionized employee not to remain represented by the union; it repudiated the then-existing collective-bargaining contract with that union and withdrew recognition from it as the exclusive representative of the employer's employees; and, it began employing workers under altered employment terms, without regard to contractual terms and to its bargaining obligations under the Act. By that conduct, the employer violated Section 8(a)(1), (3), and (5) of the Act.

B. The Icebreaker Structure Project

Located on the Mississippi River is a hydroelectric powerhouse or station operated by Union Electric Co. (Union Electric). That powerhouse runs roughly north and south, almost parallel to the river's western bank. The city of Keokuk, in Lee County, Iowa, is located on that western bank. The powerhouse is so situated on the river that a channel, separate from the eastern rest of the river, exists between it and Keokuk.

The north end of the powerhouse adjoins the western terminus of the Keokuk Dam, Lock & Dam No. 19, which extends from there eastward to the Illinois shore of the river, at the city of Hamilton in Hancock County, Illinois. From the western end of the Keokuk Dam, where it adjoins the northern end of the powerhouse, to the Iowa shore is where the above-mentioned channel begins, running southward to the other end of the powerhouse and the lock. Were that channel left open and unprotected at its northerly beginning, the powerhouse turbines and generators would be vulnerable to floes and other debris being carried southward by the river.

To minimize, if not eliminate, the possibility of such damage, a breakwater or icebreaker structure exists at the northern end of the channel, to protect the channel from whatever is being carried in the river's southerly flow. In reality, there are two sections of that structure. A small portion extends southeasterly from the Iowa shore into the river. That portion of the icebreaker is not involved in this proceeding.

What is involved is the much longer section, approximately 1100 feet in length, which commences at the western end of the Keokuk dam and which, from there, runs northwesterly into the channel, toward the Iowa shore, terminating at a point somewhat northeast of the southeastern end of the smaller icebreaker structure section.[2] That larger icebreaker structure—which will be referred to hereafter as the icebreaker structure or icebreaker, since the small structure is not involved in the project involved in the instant proceeding—is essentially a concrete rectangle, 9 feet wide at the top and 15 feet from top to bottom. The bottom is supported by piers. A portion of the concrete rectangle is above the river's water line; the remainder is submerged down to the piers. Significant to this proceeding is the fact that although the icebreaker is an extension of a dam which runs to the Illinois shore, the entire icebreaker structure is located on the Iowa side of the river and of its navigable channel.

Over the years the icebreaker had been subjected to considerable wear. By 1995, its upper portion had deteriorated to a point where Union Electric concluded that rehabilitation or restoration was in order. It decided to rehabilitate the above-water portion and, as well, the below-water portion down to 5 feet below the river's surface. That would require essentially removal of the old, or punky, concrete from the icebreaker's sides and top, to a point 5 feet below the water surface and replacement by rebarred and anchored new concrete.

The project would be conducted on a beam-by-beam basis. That is, there are 17 beams which are part of the icebreaker. Each is 68 to 81 feet in length, with a top width of 9 feet and a side width of 15 feet. Two concrete pours would be required for each beam, for a total of 34 pours. At each beam, before the pours could be made, punky concrete had to be removed, rebars and anchors had to be installed, and gang forms for the concrete pours had to be put in place. That work would progress from beam to beam, meaning that concrete removal, rebar and anchor installation, gang form placement, and concrete pouring would be completed on one beam or a portion of it before progressing to the next beam or the remaining portion of the beam which was being worked on.

Union Electric let the project for bid on April 10. It contemplated that the project would take 2 years, 1995 and 1996, with work each season to be completed by November 15. It also required that, for better quality, the project be performed "in the dry.'' That meant that to perform the work on the ordinarily below-water portions of the icebreaker structure, coffer dams had to be anchored to the icebreaker, so that water could be drained and kept away from the normally below-water section as it was being rehabilitated.

[2] A clearer understanding of the positions of the Iowa shore, powerhouse, Keokuk dam, and icebreaker structure can be obtained by looking at R. Exh. 2.

Several firms bid on the project. Selected by Union Electric was McKenzie Engineering Co. (the Respondent). At all material times, it has been a Delaware corporation, with an office and place of business in Fort Madison, [Iowa], engaged as a contractor in the business of marine construction. In the course of conducting those business operations during calendar year 1995, Respondent derived gross revenues in excess of $500,000; performed services valued in excess of $50,000 in states other than the State of Iowa; and, moreover, purchased goods valued in excess of $50,000 which were received directly from sources outside of Iowa. Therefore, as admitted in its answer and affirmative defenses, at all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. That complaint also acknowledges that Respondent has been "an employer engaged in the building and construction industry[.]"

Respondent's owner and president is Robert J. McKenzie, an admitted statutory supervisor and agent of Respondent. During 1986 he ceased operating the dredging and marine work business which he had been operating, McKenzie Dredging and, during September of that year, incorporated Respondent which, since then, has performed small construction work. Most of that work involves rehabilitation of usually concrete structures by removing deteriorated concrete and replacing it with new reinforced concrete. However, Respondent also has repaired barge damage to railroad bridge structures, has performed water intake and pipeline concrete repair work, and has built new dockages. Much of Respondent's work is performed on the Mississippi River. But, it also has performed some projects on the Illinois River and in off-river ponds or small lakes. It also has done some land projects for the United States Corps of Engineers.

Having bid successfully for Union Electric's project, Respondent had first to fabricate two pairs of coffer dams which would be attached to the outside walls of each icebreaker section—by bolts, grillage, and truss frames—so that river water could be drained and prevented from reentering the areas around each beam of the icebreaker as Respondent's crew worked on it. Two pairs of coffer dams were constructed. They allowed the crew to work on a 36-foot section, meaning that one such section had to be completed each week to achieve the 2-year completion target set by Union Electric.

According to McKenzie, the project had been awarded on May 3 and, "It took approximately four weeks to fabricate the coffer dam system." To move crew and materials from the Iowa shore to the icebreaker structure, Respondent also constructed a temporary dock at the Keokuk Yacht Club. From there, Respondent portaged its crew by pontoon boat and its materials by spud boat to the sections of the icebreaker which were being rehabilitated.

For each icebreaker section being restored, the coffer dams would be attached on each side of the icebreaker, the coffer dams would be de-watered, and concrete would be removed by milling machine. Ordinarily, it took 2 days to accomplish that work.

On the third day, still-remaining punky concrete would [be] chipped out by the crew, using concrete saws and chipping guns. Holes would be drilled to place the L-shaped rebar anchors and each hole would be filled with epoxy from cartridges. Bundles of 40-foot rebar were stored on the spud barge, anchored outside of a coffer dam, and were transferred from there to the coffer dam and cut to appropriate lengths. Once cut, each rebar piece is placed or spun into an epoxy-filled hole. Whatever old concrete remains on the icebreaker were then sprayed, by spray gun, with Armatech, a substance which Union Electric required to make a better bond between old and new concrete. Angle plates were prepositioned at correct elevations to accommodate the gang forms. They were placed to allow for proper pouring of the concrete. Their bottoms were sealed and, significant to the events of November 1, their tops tied by rods, with bulkheads installed at the ends.

The work described in the preceding paragraph is normally completed during the third day for each icebreaker section. However, completion of it may carry over into the fourth day of work on a section. During that fourth day, after completion of whatever preparation work may still remain, the new concrete is poured. Ready-mix concrete trucks arrive at the Yacht Club temporary dock. Concrete is poured into buckets which are portaged to the appropriate beam where a crane pours each bucket. Ordinarily, pouring is completed for a section by the end of the fourth day. Nonetheless, Union Electric required that concrete be kept moist for a week. That was the reason for Respondent's fabrication of two sets of coffer dams—so that its crew could move on to the next icebreaker section while the just-completed section's concrete was being kept moist.

C. Respondent's Collective-Bargaining Relationship

Ever since McKenzie operated as McKenzie Dredging, he had a bargaining relationship with Carpenters Local 410, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union), a labor organization within the meaning of Section 2(5) of the Act. Paragraph 5(b) of the complaint alleges that Respondent's "recognition [of the Union] has been embodied in successive collective bargaining agreements, the most recent of which is effective for the period May 1, 1994 to April 30, 1997."

In fact, the evidence shows that on April 26, 1994, McKenzie executed, on behalf of Respondent, a collective-bargaining contract with "the NORTHWEST ILLINOIS & EASTERN IOWA DISTRICT COUNCIL OF CARPENTERS (UNION), FOR AND ON BEHALF OF CARPENTERS LOCAL UNION 410." At the time McKenzie executed that contract, the record shows that it already had been executed on behalf of the Union by its business representative, Jim S. Decker. Decker testified that the Union is a member of Northwest Illinois & Eastern Iowa District Council of Carpenters.

In the final analysis, there is no dispute that Respondent had executed and has been a party to that 1994–1997 collective-bargaining contract. In its answer and affirmative defenses, however, Respondent contends that, "The collective bargaining agreement between [it] and the Union . . . its terms does not apply to this dispute."[3]

[3] Respondent also contends affirmatively that if it should be concluded that the contract does apply to this dispute, then "the Board lacks jurisdiction over this dispute and should defer to the mandatory dispute resolution procedures provided in the collective bargaining agreement." But, Sec. 10(a) of the Act provides, in pertinent part, that the Board's power "to prevent any person from engaging in any unfair labor practice . . . shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ." To be sure, the Board has been willing to defer in certain situations to parties' disputes resolution agreements. See *Collyer Insulated Wire*, 192 NLRB 837 (1971); and *United Technologies Corp.*, 268 NLRB 557 (1984). However, the Board has not been willing to extend deferral to situations where, as here, it is alleged, in

The recognition provision of the 1994–1997 contract—article I, section 1 —specifies that:

> The Northwest Illinois & Eastern Iowa District Council of Carpenters is recognized as the bargaining agent for all journeyman and apprentice carpenters employed by the employer in the following Iowa counties: Des Moines, Henry, Lee, and Louisa south of the Iowa River, and the following Missouri counties: Clark, and the eastern one-half of Scotland excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Article.

In fact, there is no definition of "supervisors" in Article I. Apparently use of the word "Article'' is a mistake and it was "Act" that had been the intended word.

Article I of the contract provides for further exclusions from the scope of its section 1. Article I, section 4 recites:

> This Agreement recognizes that there are separate agreements covering Highway and Heavy construction work, Residential, Millwrights, and Divers.
>
> This Agreement excludes work under Highway and Heavy, Residential, and Millwright contracts.

In fact, there is a collective-bargaining contract—the "HEAVY AND HIGHWAY CONSTRUCTION AGREEMENT" for the "STATE OF IOWA"—effective by its terms from December 1, 1993, through November 30, 1998. It is between the Heavy Highway Contractors Association of Iowa and the Iowa State Council of Carpenters and affiliated Local "Unions." One of those affiliated locals is the Union.

In its description of the parties to it, the Heavy and Highway Construction Agreement recites that it "is entered into by and between the Heavy Highway Contractors Association of Iowa [the Association] for and on behalf of those contractors who have assigned their bargaining rights to the Association as well as other contractors desiring to participate under the terms and condition of such Agreement. . . ." However, Respondent is not a member of the Heavy Highway Contractors Association of Iowa. The parties stipulated that Respondent has not delegated bargaining authority to any other association or individual to sign the Heavy and Highway Construction Agreement on behalf of Respondent. They further stipulated that Respondent has not signed that agreement. In short, so far as the record in this proceeding shows, Respondent is a total stranger to the Heavy and Highway Construction Agreement. Its only collective-bargaining contract has been with the Union.

Even so, the fact that Respondent is not a party to the Heavy and Highway Construction Agreement does not resolve the issue of whether some or all of its employees, particularly those working on Union Electric's icebreaker structure rehabilitation project, might be excluded from the contract to which Respondent and the Union are parties, as Respondent contends. After all, article I, section 4 of Respondent's contract with the Union, quoted above, does "exclude[ ] work under Highway and Heavy . . . contracts," without requiring specifically that employers signatory to the Council of Carpenters Contract actually be signatory to the "Highway and Heavy" contract. Accordingly, the subject requires closer examination.

The work which the complaint alleges was covered in this proceeding is that which is described in subsection B: rehabilitation of an icebreaker structure located on the Mississippi River. Arguably such work could be covered under the Heavy and Highway Construction Agreement. Its article II, section 3 states, to the extent pertinent, that the agreement "shall govern all 'Highway-Heavy and Railroad Construction,'" and its article IV defines such work as including, among a plethora of other items, "locks, dams, levees, revetments, channels, channel cutoffs, intakes," as well as "breakwaters, docks, harbors[.]" Further, that same section's inclusions covers "dredging except on the Mississippi and Missouri Rivers[.]" That specific exclusion of those two rivers at that point in the contract could be construed as some indication that breakwaters and docks, mentioned earlier, on the Mississippi River would not be excluded from the Heavy and Highway Construction Agreement's coverage.

Respondent's project for Union Electric involved what almost everyone usually referred to as an icebreaker structure or, simply, as an icebreaker. Nevertheless, McKenzie also referred to the icebreaker as a breakwater. Beyond that, it would be difficult to conclude that mere lack of mention of icebreakers from the numerous items included as "Highway-Heavy and Railroad Construction" would mean that icebreakers are not encompassed by some of the specific items enumerated in the Heavy and Highway Construction Agreement's definition of that phrase. After all, Union Electric's breakwater structure is connected to the Keokuk Dam. It is part of the northern end of the channel leading to Lock 19. It does serve at least some of the same functions as the more traditionally thought of breakwaters. It does serve as a cutoff for the channel which terminates at Lock 19. In consequence, there is some basis for concluding that work on the Union Electric icebreaker structure would be covered by the Heavy and Highway Construction Agreement and, in turn, excluded from coverage under the terms of Respondent's 1994–1997 collective-bargaining contract with the Union.

Still, too hasty a resolution should not be reached whenever it is a collective-bargaining contract, and its coverage, which is involved. "A collective-bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts, which control such private contracts." (Citations omitted.) *Transportation Union v. Union Pacific Railroad Co*., 385 U.S. 157, 160–161 (1966). "For the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context." *NLRB v. C & C Plywood Corp*.T1, 385 U.S. 421, 430 (1967). "In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." Id., 385 U.S. at 161.

The fact that it is the contractual bargaining unit—a nonmandatory subject of bargaining—which is involved does not change that analytical process. The scope and the composition

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essence, that an employer "has acted in total disregard of its collective-bargaining obligations, subverted the collective-bargaining or grievance process, or demonstrated enmity to employees' exercise of Section 7 rights." (Fns. omitted.) *Servomation Corp*., 271 NLRB 1112, 1113 (1984). Moreover, at no point prior to, during or since the hearing has Respondent shown that it has taken action which could be construed as willingness to arbitrate the claims of the Union and of the employees discharged on November 1. See, e.g., *Hotel Roanoke,* 293 NLRB 182, 187 fn. 19 (1989). To the contrary, Respondent contends that the contract did not encompass the Union Electric project and, in any event, has repudiated that contract. Accordingly, this is not a dispute to which deferral is an appropriate alternative to resolution by the Board.

of even certified bargaining units can be changed as a result of agreement, express or implied, between the parties. See, e.g., *Tom Kelly Ford*, 264 NLRB 1080, 1081–1082 (1982); *Brom Machine & Foundry Co. v. NLRB*, 569 F.2d 1042, 1043 (8th Cir. 1978). "When parties by their uniform conduct over a period of time have given a contract a particular construction, such construction will be adopted by the courts." *Pekar v. Brewery Workers Local 181*, 311 F.2d 628, 636 (6th Cir. 1962), cert. denied 373 U.S. 912 (1963).

The singularly significant facts here are that, until November 1, Respondent had been obtaining carpenters for the Union Electric icebreaker project through the Union, had been recognizing the Union as the bargaining agent of those employees as they worked on the icebreaker project, and had been applying the terms of the 1994–1997 collective-bargaining contract with the Union to the employment of those employees there. Accordingly, those carpenters had been treated both by Respondent and by the Union as embraced by their contract's bargaining unit.

For example, McKenzie testified that "before I even bid the job," he had spoken with Business Representative Decker about the Union's ability to provide apprentices so that, given "the rates you guys have" for journeymen, Respondent would be able "to equalize that wage rate" and, thereby, "meet" the bids of "the local competition." Such a meeting before a project began was not extraordinary. McKenzie testified "this is common. I mean, in this day and age for the contractor and the union business agent to get together and try to meet the competition head on." Thus, in connection with the icebreaker project, Respondent had proceeded with its ordinary procedure followed in connection with its bargaining relationship with the Union.

There were later instances, as the project progressed, when McKenzie concededly referred to Respondent's understanding that the 1994–1997 contract with the Union applied to carpenters who were rehabilitating Union Electric's icebreaker structure. When an apprentice who was supposed to, but did not, report for work on the icebreaker, McKenzie testified that he had complained to Decker, "you are not performing, you have a contract with me." McKenzie also described a conversation with Decker, prior to November 1, about a carpenter who, it had been reported to McKenzie, would not show up when the weather was inclement. McKenzie testified that he had told Decker, "Mark Spiekermeier told me that Fred Arnold was going to work on good weather days only. And I go, wow! I said, your contract doesn't read like that at all."

McKenzie admitted that Respondent had observed the terms of its collective-bargaining contract in connection with the work being performed, at least prior to November 1, on the icebreaker structure. Wages were paid as specified by that contract. The contractual vacation deduction system was followed. Union dues were deducted from the pay of carpenters working on that project and were transmitted to the Union.

In sum, a preponderance of the evidence establishes that, at least from May to November 1, Respondent had been recognizing the Union as the bargaining agent of carpenters employed by Respondent to work on Union Electric's icebreaker structure. The Union never objected to being recognized as the bargaining agent of those employees. Rather, it dealt with Respondent as those employees' bargaining agent. There is no evidence that any other labor organization or the Iowa State Council of Carpenters ever claimed that recognition of those employees should have been extended to a labor organization other than the Union, nor under a collective-bargaining contract other than the 1994–1997 contract between Respondent and the Union. More specifically, there is no evidence of any claim by anyone that the terms of the Heavy and Highway Construction Agreement should have been applied to carpenters employed by Respondent on the icebreaker project.

Therefore, the uniform practice from May to November 1 of recognizing the Union and of applying the terms of its 1994–1997 contract with Respondent to the latter's employees working on the icebreaker—whether characterized as contractual interpretation, amendment, modification or novation—serves to establish that Respondent had recognized the Union as the bargaining agent of those employees and, further, that the parties had agreed that the 1994–1997 contract should be applied to those employees. Respondent is not free to now disavow a practice which it had been following until it became dissatisfied with continuing to deal with the Union.

Not faring any better is a contention that the project is not covered because it involves work being performed on a river, rather than on the Iowa shore. In the first place, as pointed out in subsection B, the icebreaker is located on the Iowa side of the Mississippi River and its channel. So, it is within the State of Iowa. In fact, secondly, the parties stipulated that Union Electric's project is geographically located in Lee County, Iowa. As quoted above that is one of the Iowa counties included in the recognition provision of article I, section 1 of the 1994–1997 contract. Finally, as concluded above, Respondent did, in fact, recognize the Union as the bargaining agent of employees whom it requested that the Union dispatch to the icebreaker project and did, in fact, apply the terms of the 1994–1997 contract to those employees until November 1. Therefore, the fact that the project was located on the river, rather than on land, does not serve to establish that the Union had not been the representative of employees whom it dispatched to work on it.

It is accurate that some of the work performed on the icebreaker is not usually thought of as work ordinarily performed by carpenters. Even so, from May through November 1, no one raised any jurisdictional dispute about the work assigned to carpenters whom the Union had dispatched to that project. Moreover, prior to that project, Respondent had requested and obtained from the Union's hiring hall carpenters who worked for Respondent on a gambling dock in Fort Madison, repair of spillways on the downstream side of the Keokuk Dam, and repair of Missouri pump stations. So far as the evidence reveals, no one ever protested doing those jobs, even though some of that work may not ordinarily be thought of as traditional carpenters' work.

In light of the foregoing considerations, any objection to the scope of contractual coverage at this belated point partakes of trying to relegate a collective-bargaining contract to "an ordinary contract for the purchase of goods and services," *Transportation Union v. Union Pacific Railroad Co*., supra, rather than viewing such a contract as one which "covers the whole employment relationship," and "calls into being a new common law—the common law of a particular industry or of a particular plant." *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 578–579 (1960). Having initially secured its carpenters from the Union's hiring hall, having once recognized the Union as their bargaining agent, and having once applied the terms of its contract with the Union to those employees, Respondent is in no position to escape its statutory bargaining

obligation to the Union as the bargaining agent of those employees.

Therefore, a preponderance of the credible evidence establishes that Respondent had recognized the Union as the bargaining agent of carpenters working on the Union Electric icebreaker structure project and had applied the terms of its 1994–1997 contract with the Union to those employees. In consequence, the General Counsel has established that the contractual bargaining unit is an appropriate one within the meaning of Section 9(b) of the Act, that journeyman and apprentice carpenters working for Respondent on Union Electric's Keokuk Dam icebreaker structure were encompassed by the appropriate bargaining unit, and that the terms of the 1994–1997 contract between the Union and Respondent covered those employees.

With regard to the bargaining relationship, one final point must be mentioned. Introduced by the General Counsel was a document, signed in 1989, whereby Respondent agreed, inter alia, "that the union is supported by a majority of the employees of [Respondent] presently working within the territorial and occupational jurisdiction of the union." Left unexplained was the significance of that document, if any, to the events arising 6 years later.

As set forth in subsection B, the complaint alleges that Respondent is "an employer engaged in the building and construction industry," and the complaint further alleges that, with respect to the events at issue here, and the 1994–1997 collective-bargaining contract, Respondent had "granted recognition to the Union . . . without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act." In other words, the complaint alleges that the bargaining relationship which existed here is one which is governed under Section 8(f) of the Act.

To be sure, Respondent denied the above-quoted allegations. Nevertheless, a complaint, no less than an answer, constitutes "a 'judicial' admission that is binding on the party making that admission." (Citation omitted.) *D. A. Collins Refractories*, 272 NLRB 931, 932 (1984). The General Counsel never moved to amend the complaint. The significance of the 1989 document is left unexplained and unconnected to events which occurred when the 1994–1997 contract had been signed and, also, to the events of 1995. Therefore, I conclude that the more current bargaining relationship between Respondent and the Union had been governed under the principles of Section 8(f) of the Act.

D. Respondent's Expressions About the Union as the Project Progressed

As pointed out in subsection B, Respondent prevailed over several other bidders in securing the project of rehabilitating the Keokuk Dam icebreaker structure. To become the successful bidder, McKenzie testified that Respondent had "bid the job hard price." He further testified that, "I bid that job at $936,000.00 and there were a bunch of guys bidding against me. I was just barely low bidder on that thing and so you have to—you've got to have a fast rate of production or else you're going to go under." He agreed that the margin had been very "short" on that project, that he had been concerned from the beginning about how much he had been paying employees who worked on it, and that he also had been concerned about, "The type, the quality and the efficiency of the construction."

As the progress progressed from spring though summer and into fall, Respondent encountered not always anticipated problems. Delays resulted from equipment malfunctions and weather. For example, McKenzie testified that October "certainly was a wet month" and that, as of November 1, "we were going to have a lot of bad weather days left in the year." In fact, he testified, "It rains a lot around here. That's what makes the corn grow." Beyond equipment and weather, while the coffer dams were being fabricated the crew demanded, and eventually received, the 65-cent-per-hour premium specified in article XII of the 1994–1997 collective-bargaining contract for piledrivers. And, at the Union's behest, one of the carpenters was appointed foreman. That meant that, under article XII of the contract, he received 60 cents per hour above the journeyman's pay rate.

Business Representative Decker testified that, ever since meeting McKenzie during the early 90s, the latter had complained about Respondent's competitive disadvantage with nonunion firms doing the same work and, further, had warned that "some of these days I'm going to take a hard look at that myself and I'll, probably, have to go that way someday myself." Thereafter, testified Decker, "on occasions he would bring it up" again, complaining about the rates of nonunion competitors, particularly those of the Nelson Company.

"On several occasions" as the icebreaker structure restoration project continued, Decker testified, McKenzie had pointed to "an outfit that was working on top of the dam" and had said that he was competing against "these nonunion outfits" and "just felt as though he was going to have to go that direction one of these days." Nor did McKenzie direct such remarks only to the Union's business agent.

Carpenter Don Patterson testified that since beginning work for Respondent on the icebreaker during May, McKenzie had regularly, about "once a week," complained that "the guys down at the other end of the dam" were "[d]oing the same kind of work" as Respondent's carpenters, but were "only working for eight bucks an hour" and "were working for a lot less money than us."[4] According to Patterson, McKenzie also said that "the [u]nions have outlasted themselves," and "that he'd have to go non-[u]nion and the [u]nions were on their way out."

Carpenter Fred Arnold also testified that, after beginning work for Respondent on the icebreaker on October 2, he had heard McKenzie "talk[ ] at different times about going non-[u]nion." So, too, did carpenter Mark Spiekermeier overhear such a remark. He testified that, about 2 weeks prior to November 1, as he had been working in the coffer dam, he had heard McKenzie, speaking with someone on the top of the dam, mention another crew working on the dam and say "if they won't work in the rain I'm going to have to go non-[u]nion," or "Something like that[.]"

McKenzie never denied specifically having made any of those statements. To the contrary, he conceded, during cross-examination, having made remarks to Decker about what nonunion firms were paying their employees: "Yes. I talked to Jim a lot about Carl Nelson's people and Osage Bridge's people and his people." He also acknowledged that, during such conversations, he had compared their work to that of carpenters dispatched by the Union. When asked if he had commented to Decker about the nonunion firms making more money, however, McKenzie gave a somewhat internally contradictory answer: "No. Not really. We basically talked, you know, it's a

[4] Under art. XII of the collective-bargaining contract, Respondent then was obliged to pay its journeymen $17.65 an hour in wages, plus $1.75 an hour as pension contribution and 12 cents an hour for apprenticeship program—a total of $19.52 per hour.

competitive world. Do you agree? And, and we were talking about being competitive."

He initially agreed that, during his discussions with Decker, he had compared whether or not the nonunion people would work during a rainy day. But, McKenzie then reversed direction when asked the followup question about whether he believed that employees in the Union would not work in the rain, while nonunion people would do so: "Not at all. That's false." Yet, if that was "false," McKenzie never explained what comparison he admittedly had discussed with Decker during conversations which he initially agreed had taken place.

There also is testimony showing that, eventually, McKenzie went beyond merely complaining about the competitive disadvantage Respondent suffered as a result of being unionized—testimony showing that McKenzie took action to undermine employee support for the Union. As pointed out in subsection C, the 1994–1997 contract's article I, section 4 "recognizes that there are separate agreements covering . . . Divers." So far as the record shows, Respondent is not party to such an agreement. But, Respondent does employ divers. McKenzie testified that they are "critical" in marine operations, since they conduct preliminary explorations underwater "to determine the shape and size" of underwater structures and obstructions that must be removed and, also, perform whatever underwater work is needed as a water project progresses. "There is a limited number of people that dive," testified McKenzie, and Respondent ordinarily hires them directly, as opposed to securing divers through the Union's hiring hall.

During September, Respondent's diver for the icebreaker project, Rich Parker, was injured and had to be replaced. Vern Pascal was hired as the replacement diver. He testified that when he first had been contacted by McKenzie, on September 8 or 9, he had asked about the pay. According to Pascal, McKenzie responded "that, I believe, the union scale, $17.65, but, if I decided not to join the [U]nion, he would pay me $2.00 more." The General Counsel alleges that McKenzie's response violated Section 8(a)(1) of the Act.

McKenzie agreed that he had mentioned "around two bucks" during his initial conversation with Pascal. However, he testified that when Pascal had asked about the pay, "I said, I'll pay you the, the same that I am paying Rich [Parker], which is the carpenter's scale. And he said, I said, I don't remember exactly what the retirement package is, but it's somewhere around two bucks. And I said, I'll pay that, too."

Pascal reported for work with Respondent on Monday, September 11. He testified that on the following Wednesday, September 13, he was approached by McKenzie, accompanied by Business Representative Decker. Following an introduction, a conversation ensued between Pascal and Decker. During that conversation, Pascal testified, "Me and Jim Decker were facing each other and Bob [McKenzie] was standing, maybe, a step behind" Decker. According to Pascal, "Jim Decker asked me if I would be interested in joining the [U]nion and, when he did that, Bob was behind him, shaking his head no, and I had told him [Decker] that I didn't know enough about the [U]nion, that I'd have to find out and I'd think it over and let him know later." The complaint alleges that McKenzie's negative headshaking constituted an unlawful effort to urge an employee not to join the Union.

McKenzie denied that he had ever urged Pascal not to join the Union, but he did acknowledge having "urge[d] him to stand back a little bit, examine the situation. You know, he had never been around an organized union employment situation before." However, it is not disputed that Pascal had not worked for Respondent for approximately 3 years and, when he had done so during 1992, that he had worked only 2 days for Respondent. Given that undisputed fact, McKenzie never explained how he supposedly had known that Pascal "had never been around an organized union employment situation before." To be sure, Pascal had said to Decker that he "didn't know enough about the [U]nion[.]" Even so, the Union is not the only labor organization in Southeastern Iowa, as the Heavy and Highway Construction Agreement, alone, reveals. So, Pascal's unfamiliarity with the Union would not mean that he had "never been around an organized union employment situation before," as McKenzie asserted. In the end, McKenzie never did explain how he supposedly had known what experience Pascal may have had with unions.

McKenzie agreed that he had shaken his head negatively while Pascal had been speaking with Decker. But, he denied that, by having done so, he had been urging Pascal not to join the Union: "Oh, absolutely not. No." Yet, his testimony as to why he had been shaking his head in the negative was not consistent.

During direct examination, he claimed that, as Pascal and Decker had been talking, "I am standing about, oh, ten, twelve, fifteen feet away from them. They are just having their own little private conversation. And I sort of know what the conversation is. God, I have been around this long enough." Specifically, with regard to his headshaking, McKenzie testified:

> I was just shaking my head, you know, just like I am shaking my head right now, just, I said, golly, here I find Vern. I find the diver. You know, and I know it's happening. I know Jim is up there, you know, talking to him about either joining the [U]nion or going to put him on permit or we call the Dobby, you know, so he gets a fee out of the guy. And I think, geez, this really isn't what America is really all about.

However, McKenzie would not adhere to that explanation that he had shaken his head negatively in the course of thinking how unfair it was that the Union would collect at least a fee from an employee whom Respondent had located.

During cross-examination, he appeared to renew, instead, his above-described concern that Decker probably had been trying to take advantage of Pascal. "I have seen this situation many times in my life where the business agent comes up to the diver and he either wants to collect what we call a dobby or monthly payments or a work permit or else to collect the full fee to join the union, which can be a standard $250 fee," McKenzie testified. He continued, "So that's why I just started shaking my head like this and saying, oh, God, here it's going on again. And I really don't approve of that." As it turned out, that explanation would cause some difficulty for McKenzie.

Asked what a "dobby" is, he testified, "A dobby is to . . . collect. The business agent will come up to a fellow and say, you know, pay us 20 bucks a month and I'll let you work this job. That's what a dobby is." Later, McKenzie testified, "A dobby, that gives the man a permit," so that employee will be able "to work for a specific length of time, usually a week or a month." Yet, Respondent presented no evidence showing specific past situations when McKenzie had seen Decker, or any other agent of the Union, trying to collect a dobby, or any other form of monthly payment, from a diver, nor from any other employee working on one of Respondent's projects. And Respondent

presented no evidence that McKenzie had ever seen an agent of any other union make such an effort. To the contrary, he conceded that, during the "six, seven years" that he had known Decker, McKenzie had no knowledge of Decker using the term "dobby," had never seen Decker sell someone a permit, and had never heard Decker asking for a dobby or for permit money. Still, McKenzie asserted generally about business agents, "I have never seen the time when they don't want some of your money, if that's what you are asking." But, he never specified a single past instance when he had seen or heard Decker doing so, even assuming that his general assertion had been accurate.

It should not pass unnoticed that McKenzie's concern about the Union collecting forced payment from Pascal—to "let you work this job"—is not altogether consistent with its overall position that the 1994–1997 collective-bargaining contract did not apply to Union Electric's icebreaker rehabilitation project. If that contract did not apply to that project, then Decker would have had no basis for insisting that Pascal pay a dobby or permit fee to work on that project.

In any event, even had McKenzie truly not intended his headshaking as a signal to Pascal, the fact that it occurred in a context where Decker had been speaking to Pascal about joining the Union, and where McKenzie knew or at least suspected as much, would naturally leave Pascal believing that his employer did not want him to join the Union. Indeed, that is precisely what Pascal testified that he had believed. Accordingly, Respondent is responsible for the effect on an employee of McKenzie's conduct, regardless of the latter's true intent. See, e.g., *Cook Family Foods*, 323 NLRB 413, 414 fn. 5 (1997). That belief, as to McKenzie's purpose for shaking his head in the negative, would only be reinforced by what occurred thereafter.

About a week later, as the crew was on the Iowa bank preparing to get onto the boat to leave the dock, Pascal testified, McKenzie "walked up to me and asked if I was planning on joining the [U]nion." According to Pascal, he had replied that he "had been thinking about it" and, at his age, the opportunity to participate in the pension plan available through the Union left joining it "looking pretty good to me[.]" Pascal testified that McKenzie "told me once again that he would pay $2.00 more per hour if I didn't join the [U]nion." As with the earlier similar remark which Pascal attributed to McKenzie, the complaint alleges that his remarks to Pascal on this day also constituted an unlawful promise to pay an employee not to join the Union.

McKenzie denied generally that he had ever urged Pascal not to join the Union. However, when he was asked if he ever had a conversation during which he had offered Pascal $2 an hour above union scale if Pascal did not join the Union, McKenzie really never answered that question. Instead, he launched into an explanation of what he had said to Pascal, during their initial conversation about the "around two bucks" to cover the Union's "retirement package," as quoted above. Accordingly, McKenzie never actually did deny with specificity that he had offered $2 an hour above union scale if Pascal would refrain from joining the Union. And he never denied having participated in the dock conversation with Pascal, about a week after the latter had been spoken to by Decker about joining the Union.

Ultimately, Pascal did choose to join the Union and did so on approximately October 10. He paid an initiation fee of $250 and apparently signed a dues-checkoff authorization. Thereafter, dues, pension contributions, and vacation pay were deducted from his paychecks. Even so, as discussed in subsection F, infra, Pascal testified that McKenzie renewed his effort to persuade Pascal not to be a union member, following the terminations of November 1.

E. The Events of November 1

Throughout their testimony, Respondent's two principal witnesses—McKenzie and Terrance "Sonny" Little, one of Respondent's two superintendents[5] on the icebreaker project—complained about the carpenters whom the Union had dispatched to the Union Electric project and about various aspects of their performance while working there. However, neither McKenzie nor any other witness testified that there had been a decision prior to November 1 to discharge any of the carpenters, nor to discontinue recognizing the Union and honoring the 1994–1997 contract with it. Rather, McKenzie made those decisions on the basis of asserted events which, he testified, had occurred on November 1. Accordingly, it is events of that day which are the significant consideration in evaluating Respondent's motivations for McKenzie's actions that day.

There is some dispute about certain events which occurred on that date. However, there also are several facts which are either uncontested or as to which there are agreement. Scheduled to be performed on November 1 was essentially the work described in subsection B as work which occurred on the third day of a cycle of restoring a beam portion of the icebreaker: setting the gang forms, putting the ten tie rods across, and securing the bulkheads, preparatory to pouring concrete which was would occur on the following day. A seven-member crew was scheduled to perform that work: Superintendents Little and Dennison, Carpenter Foreman Don Patterson, journeymen carpenters Mark Spiekermeier and Fred Arnold Jr., apprentice carpenter Steven Perry, and diver Pascal.

Spiekermeier and Arnold had worked for Respondent in the past without, so far as the evidence shows, being discharged or otherwise disciplined. Patterson first worked for Respondent on the icebreaker project. He had begun doing so in May and, when Respondent selected a carpenter foreman, had been the carpenter chosen to be appointed foreman. McKenzie characterized Perry as "a very good worker," and testified, "I liked him." Indeed, McKenzie acknowledged that, while working on the icebreaker project, Perry had received a pay raise from, "Seven dollars to eight dollars and eighty three cents an hour," a not insignificant amount.

There had been rain at the project during, at least, Monday, October 30. That led to work being stopped during the day. Possibly there had also been rain there on Tuesday, October 31, although it appears that work had continued throughout that workday. On Wednesday, November 1 there also was precipitation. But, as discussed further below, the degree of it is disputed.

The crew was scheduled to report to the Yacht Club dock, to be portaged to the project, at 7 a.m. Neither Arnold nor Perry reported then or at any other time during that day. Admittedly, Arnold had said on Monday that he did not intend to report on Tuesday or Wednesday if it was raining where he lived. It was and he reported on neither day. As to Perry, the electricity had

[5] There is no allegation that Little or the other superintendent, Larry Dennison, had been statutory supervisors or agents of Respondent.

gone off for a period while he slept at home. By the time his alarm awakened him, it was too late to arrive at the dock by 7 a.m. So, he did not report. Nor did he attempt to contact Respondent to report that he would not be coming in. Nonetheless, it does not appear that McKenzie truly had intended to discharge Perry for not reporting and for not having called in, since at one point McKenzie admitted, "I fired Steve Perry because the other three [carpenters] had been fired." However, at other points McKenzie contradicted himself concerning his reason for terminating Perry.

During the day of November 1, there were two conversation between McKenzie and Decker about the job. During the interval between those conversations work stopped for the day on the project. McKenzie had not been at the project when work stopped and the carpenters, accompanied by Pascal, left. Upon discovering that they had done so, McKenzie fired all four carpenters, but not Pascal, and withdrew recognition from the Union, thereafter not honoring its contract with Respondent. The General Counsel alleges that those actions violated the Act. Respondent contends that McKenzie had been motivated by the events of November 1 which represented the capstone to a course of unsatisfactory performance by both the Union and its carpenters throughout the project's duration to then.

Inasmuch as McKenzie made all of the allegedly unlawful decisions, it is his motivation which is of necessity the "pivotal factor" or "focal point" of analysis not only as to the allegations of discrimination, see discussion, *Schaeff, Inc*., 321 NLRB 202, 210 (1996), enfd. 113 F.3d 264 (D.C. Cir. 1997), but also because the terminations were an integral component of Respondent's asserted motivation for withdrawing recognition from the Union and for refusing thereafter to honor its collective-bargaining contract with the Union.

The fact is that McKenzie gave testimony about the sequence of events on November 1 which was sometimes internally contradictory, other times inconsistent with Respondent's other evidence and with objective considerations, and on occasion uncorroborated by Superintendent Little, Respondent's other principal witness, in material respects. Little also gave testimony which was often not reliable. Those objective considerations, illustrated during the discussion which follows, support my impression, formed as they testified, that they were not being candid and that their testimony cannot be relied upon.

Probably the best starting point in that respect is the testimony given by each on direct examination during Respondent's case-in-chief when, presumably, Respondent was presenting the facts in a posture most favorable to its defense. McKenzie testified that, "I was at the Yacht Club at 6:30" on November 1 and,

> I waited around for the crew. You know, our leaving time is 7:00. You know, we might have waited around a couple of more minutes for Steve [Perry] and Fred [Arnold]. They didn't show and the, the pontoon boat goes out to the jobsite. And I hang around maybe another five minutes with my car.

Then, testified McKenzie, he had driven "around to the Hamilton [Illinois] side [of the dam] and, and come across the dam. I want to make sure that we get those end bulkheads in so we can pour the following day."

According to McKenzie, "I would be out to the jobsite at about quarter to 8:00, say." After arriving, he testified, the following events transpired:

> I see Mark Spiekermeier there. And Larry Dennison is running the crane and he is passing something over to him. It's not a big thing. I even forget what it was. But, it might have weighed a couple hundred pounds, with the crane. And he dropped it, oh, you know, in front of Mark maybe a foot or two. That, I'm not saying it happens all the time, but it sure happens a lot. And Mark yelled like mad at Larry, you know, by God, watch what you are doing. Don't you know how to run the crane and that kind of stuff. And I could see that Mark was pretty huffy. And so, you know, after that happened, you know, Mark is down in the coffer dam with Don [Patterson] and says, you know, all we got to do is set these four end forms. You got the top tie rods on because the day before, I knew that we had all the gang forms set. All we had to do from the previous, I knew that all we had to do was put the Dywidag top rods across. I think there is about ten of them you put across. That takes, you know, a half hour to do. So all we had to do was put in those four bulkheads that day. We can make a pour the next day. And we have always been able to put those bulkheads in in about four hours. And so Mark is down there with Don. And I send Larry down there to help him. You know, they are two guys short. And Mark turns around to me and says, hey, we are not working with these guys. You know, they are not carpenters. Larry is not a carpenter. And I said, you know, bullshit. I said, your guys don't show up. You know, I got a contract to do. You got a responsibility to perform and let's get those bulkheads in. They said, no way. We are going to do it ourselves.

Confronted with that situation, testified McKenzie, "I got madder than hell and read them the riot act," after which, "I said, I am going to go back, I said, I am going to go back and talk to your business agent, Jim Decker, right now. We are going to get this straightened out. Cause I was hot."

McKenzie testified that there had been no arrangements made prior to November 1 for him to meet with Decker that day and, moreover, that there had been nothing other than his firsthand observation of what had occurred that morning which had led him to meet with Decker. Upon arriving at Decker's office, testified McKenzie,

> [T]he first thing I did, I, you know, explained to him, I said, I am really unhappy. I said, you know, you got, two of your guys didn't show up today. I said, Fred didn't show up and Steve didn't show up. And I said, boy, it's hard to run a contract when you are short handed like that. And I told him, I said, you know, I have heard from Mark Spiekermeier that Fred isn't going to show up on rainy days. And, you know, it might be a rainy day and the guy doesn't show up. So then I get into the fact, I said, you know, I have got a work stoppage out there. And I, I said, I was out there this morning, you know. And all we have to do is set those four end forms and we can make our pour tomorrow. An easy thing to do, we have done it before. It takes a four hour operation. And I said, I also told him about the incident of Mark Spiekermeier where he claimed that Larry dropped the load on in front of him. I said, you know, that happens, but it's just no big deal. And I have been in construction 35 years and we have never had an accident. I am the only contractor I know that hasn't had an accident.

According to McKenzie, Decker "was surprised the two guys didn't show up," and said he could not go to the site immediately, because of a conflicting appointment, but would go there later during the day.

At that point, testified McKenzie, "I told him . . . . I sent Larry down to help Mark and, and Don get those end pieces in. And, you know, Mark reads the riot act to me saying, you know, Larry is not a carpenter. He is an operator. We are not going to work with him." According to McKenzie, he repeated for Decker that,

> I told Mark, I said, look, you guys are short. Two of your guys don't show up. I got a contract with Union Electric. We got to produce. You got to produce. And you are not going to do it. I said, you guys are doing a work stoppage on me. So I was just, I mean, I was so mad, you might assume I sound mad now. I was twice as mad.

McKenzie testified that he left Decker's office, "ran up to my office, which is about a mile away and I checked in to see if I had any telephone calls," and, then, "head[ed] back to the jobsite."

Upon arriving there, testified McKenzie, he discovered that "Mark and Don were gone" and Little "tells me what's happened and I said, well, did you guys get the bulkheads in? He said, no. I said, hey, it's not raining very much, is it? He said, no, it's just a little sprinkle." So, "I said, I am going to go back and see Decker. I am really madder than hell."

When he arrived at Decker's office, McKenzie testified, "Jim was at his desk and in front of his desk, he had two chairs. And Mark and Don were sitting there drinking a beer talking to Jim." When he asked the two carpenters why they were not working and why the other two carpenters had not shown up for work, according to McKenzie, "they just sat there and sort of mumbled. I think Don said, do you want a beer?" McKenzie denied expressly that either carpenter had said anything to the effect that Little had called off the job. So, McKenzie testified, "I said, you know, loyalty is a two-way street. I said, you know, I have tried to be loyal to you guys and you guys got to be loyal to me. And, you know, if it doesn't work out, you know, we are going to end this damn thing." He testified that he also said, "[Y]ou guys have basically stopped working. I said, I am just going to go out in the street. I am going to go down to the Job Services file, the unemployment office and I am going to see if I can find some guys that want to work."

It was then, testified McKenzie, that he had made the decision to terminate the four carpenters. As to his reasons, at that point McKenzie testified, "Mr. Arnold and Mr. Perry weren't there. So they, you know, no shows deserve to be fired." As to Patterson and Spiekermeier, he testified that he had made the decision to fire them, "[b]ecause of the work stoppage. They wouldn't work with Larry and we weren't getting anything done. You know, we had a history of that for, and it wasn't just today. It's been going on for a long time." Further, when called earlier as a witness by the General Counsel, McKenzie acknowledged having told Decker "if your people do not perform I have no other choice than to" go my way and you go your way.

As must be obvious from the foregoing description, McKenzie was not able to testify with firsthand knowledge as to what had occurred at the project between his conversations with Decker on November 1. Respondent's evidence as to that subject was supplied by Superintendent Little. During direct examination, when appearing on behalf of Respondent, Little testified that, "we were working up 'til eleven o'clock," when,

> [E]verybody went in the shack [located in the coffer dam], as I recall. The people that were there went in the shack. It was more of—It was kind of a drizzly day and other things went on. I walked in that shack and I said are we going to work today or are we going to stand in the shack, probably, is what I said, and I don't even know what was said, but I went out of the shack and then I walked around, just picked up tools, like electric stuff laying out there, maybe, getting wet, I don't recall. But I did go back in the shack again and I asked them if they was going to work and, if they wasn't, I said I can't see paying you for standing in this shack.
>
> . . . .
>
> And then I went out and I talked to the other superintendent. He's—He was up there at the time. And I said, Larry, if these men aren't going to work, we might as well shut down. Now I, probably, did that because, being a boilermaker and a union man, you start to work, you get paid four hours. So I thought, well, we've got four hours, hopefully, made, let's don't get paid for standing in the shack and not being productive. That's, probably, where I came from. Well, they wasn't intending on going out, anyway. So we went over and Larry went in there and we looked at them. I don't think anything was said.

Asked if the crew had indicated to him that they were not going to work, Little answered, "No, they didn't intend to work. I mean, when I went in the shack the second time, they was picking up their lunch box and that and, when everybody come out, we started locking up the equipment."

Obviously, an employer is free under the Act to discharge employees who do not show up for work when they are supposed to report. And, so too, is an employer free to discharge employees who are refusing to continue work, so long as they cannot be fairly concluded to have been engaging in a strike. Even so, however, an employer cannot prevail on the issue of motivation simply by showing existence of "a legitimate reason for its action[.]" *Roure Bertrand Dupont, Inc*., 271 NLRB 443, 443 (1984). See also *Monroe Mfg*., 323 NLRB 8 (1997). For, "the mere existence of a valid ground for discharge is no defense to an unfair labor practice charge if such ground was a pretext and not the moving cause." *NLRB v. Yale Mfg. Co*., 356 F.2d 69, 74 (1st Cir. 1966).

Beyond that, "when a respondent's stated motive for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." (Footnote omitted.) *Fluor Daniel, Inc*., 304 NLRB 970, 970 (1991). See also *Shattuck Denn Mining Co. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966). Here, while it has been shown that Arnold and Perry had failed to report for work on November 1, there has been no credible evidence that their failure to report that day had been the actual reason for their discharges. Moreover, analysis of McKenzie's and Little's testimony shows that it cannot be relied upon to show any legitimate reason for the terminations of Patterson and Spiekermeier, either.

At the first stage of November 1's events, when the crew reported to the Yacht Club dock for work on November 1, it is accurate that neither Arnold nor Perry had been present and neither of them reported for work later that day. Even so, McKenzie's sometime effort to portray himself as having been

unaware of why Arnold had not reported is contradicted by other testimony which he gave.

By way of explanation, as pointed out above, there had been precipitation during that workweek. Because of it, the project had been shut down early on Monday, October 30. On that day, Arnold testified, "The forecast was for rain to be all week," and so, "I more or less told them that if it was raining I wouldn't be in because it was just a waste of my time and their time and their money for everybody to come in and stand around for two hours and then go home." He further testified that in Fort Madison, where he lived, "Tuesday and Wednesday morning it was raining at my place when I go up[.]" So, he did not report for work on either day. On its fact, of course, such an attitude appears a somewhat arrogant usurpation of a prerogative belonging to Respondent. Yet, there is more to Arnold's situation.

In fact, Little had been made aware of Arnold's no-show intention. Arnold testified that he had informed Little about his intention not to report on Tuesday or Wednesday if it were raining. Little agreed, at least up to a point, with that testimony. For, he testified, "Fred said, Sonny, if it's raining tomorrow, I probably won't be in." Little further testified that he had responded merely, "Fred, you do what you got to do. That's my favorite line."

To be sure, as pointed out above, there is no allegation in the complaint that Little had been a statutory supervisor. Nevertheless, McKenzie conceded that Little had possessed authority to approve time off. In fact, a pre-November 1 illustration of that approval authority was provided by McKenzie, when questioned about Perry's early departure for work during October for a court appearance:

> A. He explained to the superintendent and I found out later that he'd, I believe he had to go to Court in Burlington.
>
> Q. So he did not leave without permission, is that right?
>
> A. No.

Little never testified specifically that he had related to McKenzie what Arnold had said. Still, if McKenzie had been asking on the dock about Arnold at 7 a.m. on November 1, it seems unlikely—or, at least, odd—that Little would not have informed his employer about what Arnold had said. Yet, even if Little had not done so, McKenzie gave testimony which shows that he had been aware on November 1 of Arnold's intention.

As quoted above, McKenzie testified that, during their first conversation that day, he had said to Decker, "I have heard from Mark Spiekermeier that Fred isn't going to show up on rainy days." Moreover, McKenzie also testified that, even prior to November 1, he had told Decker that, "Mark Spiekermeier told me that Fred Arnold was going to work on good weather days only. And . . . I said, your contract doesn't read like that at all. He, if he is a carpenter, he better show up. Period," and Decker "agreed with me." Accordingly, McKenzie's own testimony refutes his assertion of unawareness on November 1 as to why Arnold had not reported for work.

As to Perry, in a letter submitted during the investigation of the charge underlying this proceeding, then-counsel for Respondent stated that Perry "had failed to report for work on several occasions in the past."[6] After questioning about those supposed "several occasions," however, McKenzie—who initially portrayed Perry as having "missed two days"—eventually conceded, when shown Respondent's attendance records, that Perry only had missed "three hours" 1 day for the above-mentioned court appearance, about which he had told Little in advance, and a half day on October 30 because Respondent had sent its entire crew home early due to rain. In other words, prior to November 1 Perry had reported for all or most of every work day and, conversely, had not "failed to report for work on several occasions," as Respondent had claimed during the investigation.

Indeed, McKenzie followed a similar course, about attendance, when testifying initially about Arnold's past attendance while working on the icebreaker structure. McKenzie testified, "Well, Fred Arnold I think, had worked like fifteen days for us and he'd missed three or four days." But, Respondent's records showed that, since beginning work for Respondent on October 2 on Union Electric's project, Arnold had missed only 1 day, during the week of October 9. Of course, he also had missed work on October 31. As discussed above, however, that had been an absence which he had reported in advance to Little. So, presumably, it had been one, like Perry's missed hours for a court appearance, that Respondent did not regard as having been without permission, since Little admittedly had not objected to what Arnold had said about missing work if it rained.

As additional support for Respondent's decision to discharge Perry, McKenzie testified generally that "[e]verybody was informed" to call Respondent's office to report whenever they would be absent, either to McKenzie or to Diane Ford, the person who performed Respondent's office work. If neither were there, the caller could record a message on the answering machine. Perry admitted that he had never tried to call Respondent's office upon awakening on November 1 and discovering that his alarm had not gone off. However, he denied that he ever had been told what to do whenever he intended not to report for work. And neither McKenzie nor any other witness for Respondent testified with particularity about having specifically told Perry what course to follow to report whenever he would be absent.

As a practical matter, in fact, it would hardly have advanced Respondent's situation on November 1 had Perry called the office. Perry testified that he had awakened at approximately 6:50 a.m. By that time McKenzie was already at the Yacht Club dock. Ford testified that she does not usually report for work until 7:30 a.m. McKenzie gave no testimony that, upon discovering that Perry was not at the dock, he had called Respondent's office to ascertain if there were any messages on the answering machine. In fact, his own above-quoted testimony shows that not until after his first conversation with Decker had he "checked in to see if I had any telephone calls with Diane." As a result, even had Perry called when he awoke on November 1, and recorded a message about his situation on the answering machine, McKenzie would not have learned about it until well after work had started that day.

Finally, in connection with the point at which the crew reported for work on November 1, McKenzie sometimes testified

[6] Lest there be continued doubt about the subject, letters of counsel submitted during the investigative phase of a proceeding are admissible during the hearing phase. See *Optica Lee Borinquen, Inc*., 307 NLRB 705 fn. 4 (1992); *Massillon Community Hospital*, 282 NLRB 675 fn. 5 (1987); *Bond Press, Inc*., 254 NLRB 1227 fn. 1 (1981). For, "statements made by attorneys in a representational capacity" are excluded from the definition of hearsay. *Lightning Lube, Inc. v. Witco Corp*., 4 F.3d 1153, 1198 (3d Cir. 1993).

that Perry and Arnold had been terminated for having failed to report that day. Thus, he testified initially that Perry "was terminated for not showing up," and, so too, had been Arnold: "When he doesn't show up I say he terminates himself." Later, McKenzie renewed that testimony: "Mr. Arnold and Mr. Perry wasn't there. So they, you know, no shows deserve to be fired."

No doubt, failure to report for work, when scheduled to do so, is a legitimate reason to discharge employees. Even so, however, as pointed out above the issue here is Respondent's—more specifically, McKenzie's—actual motivation for discharging Arnold and Perry. The fact that a legitimate reason for discharge may exist does nor serve as a valid defense if it is not the true motivation for discharge or is no more than a pretext for another reason.

As pointed out above, McKenzie also testified that, "I fired Steve Perry because the other three had been fired." There can be no doubt that McKenzie meant that testimony—that he misspoke or that his testimony is being taken out of context. For, he answered, "Yeah," when asked if Perry had been fired, "For no other reason than because you fired these other people," and then testified, "Well, if you have three of them gone you might as well have the fourth one gone." But, if the decision to fire Perry had not been made until the decision to fire the entire crew had been made later during November 1, it would follow that McKenzie never had intended to discharge Perry, for failing to report, upon discovering that he had not reported and during the time that McKenzie first had spoken with Decker.

In fact, McKenzie never contended specifically that he had decided to discharge either Perry or Arnold upon ascertaining that the two carpenters would not be reporting for work on November 1. True, when he first spoke with Decker, McKenzie had complained about the two carpenters' nonappearance for work that day. But, he never testified that he had told Decker that Respondent was firing Perry and Arnold as it seems that he would have done if he actually had intended at that point to discharge them for failing to report for work.

Then, McKenzie testified that he had gone to his office "to see if I had any telephone calls with Diane." However, McKenzie never testified that he had said anything to her about preparing final paychecks for Arnold and Perry, nor about taking any other steps to terminate those two carpenters. In fact, Ford testified that she did not think that it had been before 11 a.m. when she had been directed to prepare final paychecks and, at that, for all of the carpenters, not merely for Perry and Arnold.

In sum, however upset McKenzie may have been that Perry and Arnold had not reported for work on November 1, his acknowledged conduct in the immediate wake of ascertaining that they had not reported refutes any contention that he had decided to fire either man solely for missing work on November 1. Rather, the evidence leads to a conclusion that, prior to discovering later in the day that the entire project had shut down, it appears that McKenzie had condoned their absences on November 1; "to 'wipe the slate clean,' and to . . . continue the employment relationship as though no misconduct had occurred." (Footnote omitted.) *White Oak Coal Co*., 295 NLRB 567, 570 (1989). See also *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97 (7th Cir. 1971). Only later, after McKenzie had decided to fire the entire carpenter crew, in conjunction with his decision to sever relations with the Union, did he seize upon the failure of Arnold and Perry to have reported on November 1, as an afterthought to justify his decision to fire those particular two carpenters.

The second phase of McKenzie's narration about his November 1 activities concerned his claim that, after having waited at the dock for a few minutes, he had gone out to the project, where he had observed Spiekermeier becoming angry about Dennison dropping the load; had heard Spiekermeier, and possibly Patterson as well, refusing to work with Dennison, and perhaps with Little, as well, performing carpenters' work; and, had chastised the crew for their refusal to work with the two superintendents. However, there were several problems with that recitation of asserted events.

Both Spiekermeier and Patterson denied that there had been any discussion on November 1 about other crafts doing carpenters' work, denied having refused to work if Little or Dennison performed carpenters' work, and denied having refused to perform work that day for any reason. Now, it would have been highly unusual for either Spiekermeier or Patterson to have refused to work with Little or Dennison. McKenzie conceded that "many, many times" in the past Dennison had assisted the carpenters in their work and, further, that he had done so on occasions when Patterson and Spiekermeier had been present. Indeed, testified McKenzie, between May and November 1 on the icebreaker structure rehabilitation project, it had been "just about every day that when Larry wasn't milling concrete, he was, he was in there helping" the carpenters. Similarly, McKenzie admitted that Little also had been "out there helping" the carpenters with their work.

The only reason suggested by the record for a sudden refusal on November 1 by Patterson and Spiekermeier to refuse to work with the superintendents had been Spiekermeier's asserted anger at having material dropped immediately in front of him by Dennison, while the latter had been operating the crane. McKenzie testified that, "Spiekermeier on occasion, especially when the weather was hot and he was a little hot himself, would complain to me about . . . this is our work. This is carpenters' work and I don't want Larry helping me and I don't want Sonny doing our work."

Spiekermeier agreed that there had been an incident where Dennison, while operating the crane, had dropped materials near him. But, he testified that he did not "remember it being" on November 1. Patterson acknowledged that Spiekermeier "might have said something about Sonny" that day, inasmuch as "Sonny always dropped stuff with the crane, so any time Sonny was working in the crane somebody usually had something to say about it." Nevertheless, McKenzie admitted that, despite Spiekermeier's complaints in the past, he "wouldn't" refuse to do his work on prior occasions with Little and Dennison. And, as pointed out above, both Spiekermeier and Patterson denied having refused to do so on November 1.

Significantly, diver Pascal, who also had been working as part of the crew on November 1, corroborated those denials by Patterson and Spiekermeier. In contrast, while McKenzie acknowledged that Dennison remained employed by Respondent at the time of the hearing, Dennison was never called by Respondent to corroborate McKenzie's testimony about Dennison dropping material from the crane near Spiekermeier and about the refusal of Spiekermeier and Patterson to work on November 1 with Little and Dennison.

Obviously, as the superintendent who supposedly had been operating the crane when Spiekermeier became angry and, more importantly, as the superintendent who supposedly had

been told to work with the carpenters in the coffer dam, Dennison had been a central figure in McKenzie's recitation of those purported events. After all, Dennison's assignment had been the event which supposedly had touched off the refusal to work by Spiekermeier and Patterson. Certainly, as a superintendent for Respondent, there is no basis for assuming that Dennison would not be favorably disposed to Respondent's interests, just as Superintendent Little demonstrated that he was so disposed. There was no evidence, nor representation, that Dennison was not available for Respondent to call as a corroborating witness. In consequence, Respondent's failure to call Dennison, to corroborate McKenzie's testimony about the events of November 1, warrants an inference adverse to Respondent "regarding any factual question on which [Dennison] is likely to have knowledge." (Citations omitted.) *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). See also *Rockingham Machine-Lunax Co. v. NLRB*, 665 F.2d 303, 305 (8th Cir. 1981), cert. denied 457 U.S. 1107 (1982).

Of course, Little did appear as a witness for Respondent. But, he gave no corroborative testimony for McKenzie's descriptions of the asserted material-dropping in front of Spiekermeier and of the purported refusal of Spiekermeier and Patterson to work with the two superintendents, or either of them, on November 1. Little did claim generally that, "[s]ome men did. Some men didn't" work that day. Yet, given the fact that there only had been three crew members, aside from the superintendents, working that day, Little's followup testimony was rather bizarre: "A couple of them would work good. A couple of them wouldn't," and, "A couple people were walking around. Then, when they would commence to quit walking, another man would." The carpenters and the diver had names. Little knew who they were. These vague descriptions appeared to be nothing more than an illustration of what seemed to be Little's effort, as he testified, to tailor his testimony so that it would be most favorable to Respondent.

Perhaps the most significant aspect of Little's testimony was his failure to corroborate even McKenzie's testimony that McKenzie had gone to the project on November 1, before having first spoken with Decker and before the crew had left work that day. Prior to Little's appearance as a witness for Respondent, both Spiekermeier and Patterson had each denied having seen McKenzie on the project that day. So, also, had diver Pascal. Asked if he had seen McKenzie on the job after having left the dock around 7 a.m., Little testified guardedly, "I can't really remember if I saw him or did not see him between then and the time that I did see him later on in the morning," when, "I saw him coming to the job and the carpenters had left."

Indeed, Little's description of how McKenzie ordinarily managed projects left an inherent doubt that, despite McKenzie's testimony to the contrary, McKenzie likely would have come from the dock to the project when the crew first arrived there: "He gets there very early in the morning and he usually gets out there long before we do and he looks the job over," after which, "he comes back to the Yacht Club where we meet and visit." Indeed, McKenzie did testify that he had arrived in Keokuk at 6:30 a.m. on November 1. So, it is quite likely that if he did follow his ordinary procedure, described by Little, McKenzie never even went to the project after the crew left for it on the boat that day. That certainly would explain why neither Dennison nor Little corroborated McKenzie's disputed testimony about the dropped materials and about Spiekermeier Spiekermeier and Patterson's asserted refusal to work that day with the superintendents.

Turning to the next stage of McKenzie's testimony of events on November 1, there is no disagreement about the fact that he and Decker had participated in a conversation. There is a dispute as to where it occurred and, also, a dispute as to how it came to have occurred. There also are discrepancies in the two accounts of what had been said. Yet, in the final analysis, these disputed matters are not significant to resolution of McKenzie's credibility, nor to the issues presented for resolution by the complaint. The only truly significant aspect of the conversation is absence of anything arising during it which can be said to disclose an intention by McKenzie to terminate Arnold and Perry for not having reported that day, as discussed above. More significant is the testimony about what was occurring at the project.

McKenzie testified that, having left his office, he went to the project where he discovered that the crew had left. He testified that Little told "me what's happened," and "I said, well, did you guys get the bulkheads in? He said, no," after which, "I said, hey, it's not raining very much, is it? He said, no, it's just a little sprinkle." The latter question is a rather odd one, given the fact that seemingly McKenzie was as capable as Little of determining the degree of rain which was occurring. Moreover, other than testifying that Little had reported "what's happened," McKenzie never testified with particularity what precisely Little had said. Presumably, Respondent appears to intend that it should be inferred that Little had reported to McKenzie the events as Little described them when testifying. Yet, there were a number of problems with that testimony by Little.

First, his testimony was internally contradictory as to whether or not he had been the one who had shut down the job on November 1. Initially he testified, "No, I never gave them any [instructions] to shut the job down," and, "That was their [the carpenters'] decision, not mine" that the crew should go home. Yet, in his own above-quoted description of what assertedly had occurred at the site on November 1, Little admitted, "And I said, Larry, if these men aren't going to work, *we might as well shut down*." (Emphasis added.) Little further testified that he had said to Dennison, "We've got four hours in, if it's going to continue to rain, we're not going to get any production, *let's shut down now*, if that's what they want to do." (Emphasis added.) To be sure, Little blamed the decision on the supposed unwillingness of the crew to work more that day. But, his own description of what assertedly had occurred that day leaves no doubt that, contrary to his express denials, he, and perhaps Dennison as well, had made the actual decision to shut down on November 1.

Second, both McKenzie and Little gave internally contradictory testimony regarding whether or not it had been raining that day. Little testified, "[I]t was not raining that day" and, moreover, "It wasn't raining. It was drizzling." Yet, in his above-quoted description Little testified that he had said that day, "if it's going to continue to rain, we're not going to get any production[.]"

McKenzie also testified inconsistently about the weather that day. He claimed that it had been "drizzling"—what he called "old Scottish mist." But, when he described what had been said during his first conversation with Decker that day, as quoted above, he testified that he had said, inter alia, "it might be a rainy day." In fact, when called as an adverse witness by the General Counsel—before having heard the employee-

witnesses' descriptions of the weather on November 1 and its affects on their ability to continue working that day—McKenzie was asked is it was not true that it had rained on November 1. He answered, "Yes, it did." He also testified, during that examination, "When I got to the jobsite the crew had been rained out."

Third, even the rain would not ordinarily have stopped work for the day unless it was somewhat heavy, as had been the fact the preceding Monday, October 30. For, neither McKenzie nor Little contradicted Patterson's testimony that usually the crew would wait in the coffer dam shack for the rain to stop. So, it should not have been surprising for Little to have discovered them there on November 1, while it was ``continu[ing] to rain."

In that regard, Little made two rather interesting statements: "[I]f it's raining, this man [McKenzie] will pay them for sitting in that shack all day long," and, "I leave it up to their discretion. If they want to go out and work, we have rain gear." Now, if it is left to the discretion of the carpenters to decide whether or not to work while it rains, as Little admitted, and if Respondent is willing to pay them to stay in the shack while waiting out the rain, as Little also admitted, then left unexplained is why Little would have decided on November 1 to shut down simply because it was raining and the crew was in the shack.

Assuming it was only drizzling, the crew was doing nothing out of the ordinary by waiting in the shack for it to clear. It would have made no sense for Little to conclude that, "I can't see paying you for standing in this shack." But, if it was raining more heavily than McKenzie and Little were sometimes willing to concede, then, as on October 30, it would have made sense for Little to send the crew home, since they would not be able to complete their work during the remainder of the day, given the weather. In any event, contrary to Little's testimony, the fact that the crew was in the shack did not constitute any indication that they did not intend to work further that day. After all, admitted Little, McKenzie had been willing to "pay them for sitting in that shack all day long[.]"

Fourth, in his above-quoted description, during direct examination, Little testified that when he had asked, "[A]re we going to work today or are we going to stand in the shack," he did not "even know what was said" in response. In fact, at no point during that particular description did Little attribute any remark to any of the three men in the shack. During cross-examination Little initially renewed his assertion as to the crew's possible response to his question: "The exact words I don't know," pointing out, "I'm a little bit hard [of] hearing and so I left the shack."

As cross-examination progressed, however, it seemed to dawn on Little that inability to describe what one or more of the crew might have said, in response to his asserted question that day, was not so helpful to Respondent's positio—that nonresponse might not truly demonstrate that "they weren't going to go to work" and that perhaps an unheard response might leave an impression that it had not been the crew who was responsible for the November 1 shutdown, as Respondent is contending. So Little abruptly reversed field, testifying suddenly that, "They said to me we're not working in the rain." Thereafter, he maintained that he had been told that by the crew, never bothering to explain how he now was able to overcome his hearing problem and testify that, yes, he did "know what was said[.]"

In the final analysis, even that altered answer does not change the inconsistency between the crew saying it was not working in the rain and Little's above-quoted testimony that he ordinarily left it "up to their discretion" whether or not to do so, since McKenzie was willing to "pay them for sitting in that shack all day long" while waiting out rain.

Significantly, Patterson and Spiekermeier testified that there only had remained that day an hour or an hour-and-a-half's work to be finished when they had left the icebreaker on November 1. Patterson explained that only "the three remaining bulkheads" were left to be installed, after which concrete could be poured, as McKenzie testified had been scheduled for the following day. Little never challenged that testimony. Nor did he dispute Patterson's testimony that, "[t]here had to be a break in the rain sometime during the day when we could get that finished and pour it the next day." According to Patterson, when that was brought to Little's attention, the latter had retorted only, "we're going home."

Obviously, as is true of McKenzie's testimony about the purported earlier events that day, Dennison seemingly could have corroborated Little's accounts of the events leading to termination of work on November 1. But, Respondent never called Dennison. As a result, Little's testimony remains uncorroborated by Dennison. No less is an adverse inference is allowable in the context of Little's testimony than was the fact, as discussed above, in connection with the testimony of McKenzie.

The foregoing discussion provides but some examples of the internally contradictory, inconsistent, and uncorroborated testimony advanced by McKenzie and by Little. They serve to illustrate the impression which I formed that the testimony of neither man was being advanced reliably and, consequently, I do not credit McKenzie and Little.

F. McKenzie's Remaining Conversations with Pascal

Respondent did discharge Patterson, Spiekermeier, Arnold and Perry on November 1. It set out to locate, and did hire new employees to complete the project before its winter shutdown in 1995 and, also, continued the project during 1996 with employees whom it hired directly, rather than through the Union. In addition, it withdrew recognition from the Union on November 1 and repudiated the 1994–1997 collective-bargaining contract to which it was a party with the Union. Respondent did not, however, fire diver Pascal on November 1, even though he also had been one of the crew members who had left the project early on November 1.

On that date, Pascal was in his motel room when he learned that McKenzie had fired the carpenters. He went to Respondent's office and inquired if he also had been fired. McKenzie answered that he had not and would be expected to continue working. However, dues and pension and vacation contributions ceased being deducted from his paycheck after November 8. Further, by check dated November 15, Respondent paid Pascal $100.66. Printed on the bottom left portion of that check is the legend, "REFUND OF UNION DUES & VACATION WITHHELD 11/1–11/8."

Upon receiving that check, Pascal testified, he approached McKenzie and inquired about it:

> I asked him why my union dues and vacation pay and pension plan wasn't[ ] being taken from my check and he said that I didn't need the [U]nion and that in five years there wouldn't be any union and I'd lose my pension, anyway, which then I told him that I had paid $250.00 initiation fee to get into the [U]nion and that I'd prefer to stay in the [U]nion and he had

> told me that, if I was to quit the [U]nion, he would give me the $250.00 back.

"I said I didn't know, I'd think about it," testified Pascal. The General Counsel alleges that McKenzie's statements violated Section 8(a)(1) of the Act. McKenzie denied generally having ever promised to give Pascal $250 if the latter would quit the Union.

"It could have been the next day or a few days later," Pascal testified, that "I told Bob that I would prefer to stay in the [U]nion and that I wanted him to continue to take my dues and union pension plan and vacation out." Respondent resumed doing so, but not without further discussion of the subject by McKenzie with Pascal.

Pascal testified that on November 21 he was approached by McKenzie who was holding a "tablet of paper." According to Pascal, "Bob told me that he wanted to show me his insurance as it compared to the union insurance," and, "He described the paper and it showed me what his insurance cost and his benefits with his insurance and the [U]nion's insurance and he had told me . . . to look it over and see what I thought about it and that next year his company was going to have medical insurance and that he would like to do away with the [U]nion."

Pascal identified a document shown to him as the one given to him by McKenzie. Nothing on that document lists the benefits provided by the Union. However, McKenzie agreed that, "I handed Vern a piece of paper and it had written on the, the health plan that I personally have for myself." He testified that he had explained what he, personally, paid for the coverage provided to him, as well as the deductible amount. Moreover, McKenzie agreed that, while showing that calculation to Pascal, he had pointed out that the Union "doesn't have a health policy. And then I showed him where the local up in the Quad Cities has a health policy, a health and welfare policy," and, further, "I deducted the cost that [the Union] has just for retirement. So that left, I think, about $3.50 an hour that could go into . . . a health, you know, fund."

McKenzie denied expressly having said that he wanted to do away with the Union: "Not at all. I said . . . if I were Jim Decker, I would . . . get the same policy I have. It's a good deal."

II. DISCUSSION

From an overall perspective, what emerges from review of a preponderance of the credible evidence set forth in section I is a situation where an employer had been complaining for some time about its situation in the face of competition which was not unionized. The employer warned of its intention to someday become nonunion. Then, it successfully underbid the competition on a particular project, but its low bid left it with a relatively narrow profit margin for that project. As the project progressed, delays and seemingly unanticipated labor costs, such as having to pay wages at the dredging level for part of the work and appointing a foreman, naturally narrowed that margin even further. In the face of those circumstances, eventually the day did arrive when the employer did decide to go nonunion. It repudiated its collective-bargaining contract, withdrew recognition from the incumbent union and fired all but one of the employees who were members of that union. By these actions, in that employer's view, it succeeded in leveling the playing field with its nonunion competition.

Turning to the specific allegations made in the complaint, I conclude that McKenzie did make the various statements attributed to him by diver Pascal and, on one occasion, by carpenter Spiekermeier. As to the latter, McKenzie admitted that he had made statements about going nonunion. He did not deny with specificity having made one such statement approximately 2 weeks prior to November 1. To be sure, the statement had not been made to Spiekermeier; the latter merely had overheard it. However, the fact that it had been overheard does not lessen the inherently coercive impact of such a remark upon the employee who overheard it. See *Frontier Hotel & Casino*, 323 NLRB 815 (1997), and cases cited therein.

Pascal was a credible witness. As a diver, he was not necessarily included in the contractual bargaining unit described in section I,C, supra, but the parties were free under the Act to agree to add and subtract from that unit. As discussed in that subsection, they obviously had done so with regard to the icebreaker restoration project, at least. Were Pascal to join the Union, that would strengthen the latter's support among the icebreaker rehabilitation crew. Obviously, from his various admitted remarks about going nonunion, that was not a consequence desired by McKenzie.

Of course, a crew member who also was a member of the Union was a result even less desired once Respondent had withdrawn recognition from the Union. At that point, Respondent was confronted with somewhat of a sticky wicket. It needed a diver. But, divers were not readily obtainable for the Keokuk area. As a result, it was desirable to retain Pascal for diving. But it was not desirable to continue employing a member of the Union after having withdrawn recognition from it. Accordingly, there would have been an inherent logic to renewed efforts to persuade Pascal to refrain from remaining a member of the Union. Which is what Pascal's credible testimony shows happened.

In sum, not only was Pascal a credible witness, but his accounts of McKenzie's remarks and action corresponds with objective circumstances surrounding Pascal's descriptions of those remarks and actions. Therefore, a preponderance of the credible evidence establishes that Respondent did offer an employee $2 above union scale to refrain from joining the Union, did urge him through McKenzie's negative headshaking not to join the Union in response to Decker's overtures to do so, did offer him $250 to quit the Union, and did produce an alternative insurance plan to the one made available through the Union while saying that Respondent would like to "do away with the Union." In addition, as concluded above, McKenzie also was overheard by an employee saying that Respondent was going nonunion. By each of these remarks and by the negative headshaking, Respondent interfered with employees' statutory rights to join and to assist, by remaining a member, a labor organization, in violation of Section 8(a)(1) of the Act.

Turning to the four November 1 discharges discussed in section I,E, supra, Respondent's testimony about its motivation for those discharges was not advanced credibly. Of course, that does not "necessarily compel" a conclusion "that the Respondent's true motive . . . was discriminatory within the meaning of the Act." *Precision Industries*, 320 NLRB 661, 661 (1996). Still, the fact that an employer advances false of pretextual reasons for discharging employees is relevant when making a determination concerning the actual or true motivation for allegedly discriminatory actions. See *Property Resources Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988); *NLRB v. Dillon Stores,* 643 F.2d 687, 693 (10th Cir. 1981).

For some time McKenzie had been warning that the day would come when Respondent would abandon its relationship with the Union. Such statements continued to be made, perhaps with some increase, as the icebreaker restoration project progressed. In fact, as concluded above, Respondent resorted to unfair labor practices in an effort to deter one newly hired employee from becoming a member of the Union. Respondent's specific concern about continued relations with the Union had been affects of the cost of its collective-bargaining contracts on Respondent's ability to compete with nonunion firms in the same industry. With specific regard to the icebreaker restoration project, Respondent's anticipated profit margin had been narrow from inception of the project. It became even more so as a result of delays and seemingly unanticipated labor costs occurring as the project progressed through its first season. Confronted on November 1 with yet another delay, occasioned by inclement weather which forced a superintendent to shut down for the day, Respondent abruptly severed its relations with the Union, as it had long promised to do, and discharged all carpenters whom the Union represented.

The totality of those circumstances supply evidence sufficient to support a showing that Respondent's termination of Patterson, Spiekermeier, Arnold and Perry had been motivated by its overall intention to withdraw recognition from the Union and, thereafter, operate on a nonunion basis as its competitors were doing. In the face of that showing, the burden shifts to Respondent to credibly show that, regardless of its attitude toward continued relations with the Union, those four employees would have been discharged for lawful reasons, in any event. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). In view of the discussion set forth in section I,E, supra, Respondent has failed to satisfy that burden.

True, both Arnold and Perry failed to report for work on November 1 and, when he spoke with Decker during their first conversation that day, McKenzie expressed dissatisfaction over their nonappearance. Yet, his later assertions that he had terminated them for that reason are contradicted by other testimony which he gave, such as his testimony that he "fired Steve Perry because the other three had been fired," and by the absence of any evidence that McKenzie either had said or had taken any action to fire either Perry or Arnold until he made the ultimate decision to withdraw recognition from the Union and discharge all carpenters whom it represented.

It also is accurate that work on November 1 had stopped early. However, the evidence seems clear that, despite his sometimes denial of the fact, it had been Superintendent Little who had made the decision to shut down for the day. Although Little claimed that he had done so because the reduced crew was refusing to work any more, that testimony was not credibly advanced, was not corroborated even by Dennison, and was based upon a description of supposed events which was objectively inconsistent with his claim that the crew had been refusing to work. The credible evidence is that it had been raining at the time Little shut down for the day. The crew may have been in the shack, but Little acknowledged that Respondent's practice had been to allow them to do so until rain stopped. Little never challenged the testimony that Patterson had pointed out, in response to Little's announcement of the shutdown, that there had to be a break in the weather that would allow the crew to complete their scheduled work before the ordinary end of the workday.

McKenzie and Little both claimed that Patterson and Spiekermeier had been refusing to work on November 1. But, the two carpenters denied that they had been refusing to work on that or on any other day. Superintendent Dennison was never called by Respondent to corroborate the accounts of McKenzie and Little, even though Dennison had been a central figure in the descriptions advanced by McKenzie and Little. Given the employees' uncontroverted testimony that only an hour to an hour-and-a-half's work remained to be completed when Little shut down the project for the day, it would appear that the work scheduled for November 1 could have been completed during the remainder of the normal workday, had Little not chosen to shut down early. Moreover, it should not be overlooked that McKenzie testified that only 4 hours of work would be needed to complete the tasks scheduled for November 1. Obviously, if only an hour to an hour-and-a-half's work remained when the crew had been sent home, a considerable amount of the scheduled work already had been completed. There is no reason to conclude that the crew would not have continued performing that work, but for the rain and, then, but for Little's decision.

It appears that it had been McKenzie's discovery of the shutdown which precipitated his decision to sever relations with the Union and to terminate the carpenters. As pointed out above, that had been Little's decision, not that of the crew. But, the important fact is that the shutdown that day resulted in yet another delay on the project, just as the midday shutdown on the preceding Monday, October 30, had occasioned a delay. By then, it was obvious to McKenzie that his costs had been rising, both as a result of delays and of unanticipated labor costs, and, concomitantly, narrowing his profit margin even further than initially expected under his successful bid for the project. As a result, he seized upon that shutdown and implemented his long-contemplated plan to withdraw recognition from the Union.

Termination of Spiekermeier, Patterson, Arnold and Perry was an integral component of Respondent's withdrawal of recognition. Each was a member of the Union. Neither Superintendent Dennison nor Superintendent Little was terminated, even though the latter had made the actual decision to shutdown and, from Little's description, Dennison had concurred in it.

Significantly, diver Pascal, who also had left the site early on November 1, was not fired. To be sure, he was a member of the Union by then. However, he was not necessarily encompassed by the literal contractual unit description. He performed a task for which it would be difficult to locate a replacement. And McKenzie then made efforts to wean Pascal away from continued membership in the Union. Thus, Pascal's retention is both inconsistent with any contention that Respondent had discharged the crew for leaving early on November 1 and consistent with the evidence showing that Respondent's true motive for the discharges had been as an integral part of its overall intent to terminate further relations with the Union.

In sum, the General Counsel has shown that the terminations of Spiekermeier, Patterson, Arnold and Perry on November 1 had been unlawfully motivated. Respondent has failed to credibly show that their discharges had been for a legitimate reason and that it had actually relied upon that reason as the motive for discharging those four employees. At best, Respondent's defense is pretext. At worst, it is completely false. Viewing the

evidence in its totality, I conclude that the General Counsel has established by a preponderance of the credible evidence that Respondent discharged the four carpenters on November 1 to implement its overall plan of withdrawing recognition from the Union—more specifically, to eliminate those members of the Union whom it could readily replace, thereby depriving the Union of any claim to representation of a majority of the employees who, thereafter, would be working on the icebreaker rehabilitation project. Therefore, the discharges constituted violations of Section 8(a)(3) and (1) of the Act.

As to the alleged bargaining violations, Respondent concedes that it withdrew recognition from the Union, admits that it repudiated its 1994–1997 contract and its terms, and acknowledges that, thereafter, it directly hired carpenters and established the employment terms under which those employees would work. No trust fund contributions were made on behalf of employees working on the icebreaker after November 1. No dues-deduction authorizations were made available to them.

Under the proviso to Section 8(d) of the Act, both employers and labor organizations are obliged to refrain from making midterm modifications of collective-bargaining contracts, without the agreement to those changes by the other party to the contract, and are obliged to honor collective-bargaining contracts for the duration of their term. That statutory obligation is one expression of "the federal labor policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored." (Citation omitted.) *W. R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 771 (1983). In turn, that Federal labor policy is rooted in the general tradition of Anglo-American jurisprudence that one must perform as his/her contract is written. See *E.G. & G. Rocky Flats*, 314 NLRB 489, 490 (1994). Accordingly, an employer violates Section 8(a)(5) and (1), and Section 8(d), of the Act whenever it fails to continue honoring its collective-bargaining contract and its terms. See, e.g., *Ortiz Funeral Home Corp*., 250 NLRB 730 (1980).

That obligation exists even where, as the complaint specifies is the situation here, the collective-bargaining relationship, and the contract bred by it, is one which has arisen under Section 8(f) of the Act, rather than under Section 9(a) of the Act. See *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). An employer is not free under the Act to simply repudiate the contract and go its own way thereafter.

Respondent contends that the Union had been failing to perform its own obligations under the 1994–1997 contract in connection with the icebreaker project. In doing so, of course, it relies upon the testimony of witness whom I have not credited. But, even were that so, the Act does not countenance forms of vigilantism whereby parties to collective-bargaining contracts are free to simply abandon altogether those contracts, and the entire bargaining relationships which have given rise to them, and ride off into an unrepresented sunset, merely because of unsatisfactory performance under those contracts by the other side.

To allow that type of conduct would lead to industrial anarchy which is hardly contemplated and condoned under the policies of Section 1 of the Act. Article XX of Respondent's 1994–1997 contract with the Union sets forth a grievance procedure for resolving disputes between the parties over performance under the contract. Section 8(b)(3) of the Act provides a basis for employers to file unfair labor practice charges should they feel that labor organizations with whom those employers have contracts are not honoring those contracts. Those are the appropriate avenues for employers to pursue whenever they believe that their employees' bargaining agents are failing to honor collective-bargaining contracts. Self-help which terminates altogether bargaining relationships is an unlawful course, under the Act, when confronting such situations.

In sum, Respondent withdrew recognition from the Union and repudiated the parties' collective-bargaining contract on November 1. Thereafter, Respondent directly hired carpenters for, at least, the Union Electric project and applied to those employees' employment terms which Respondent formulated, without notifying the Union of them. Respondent also ceased making trust fund deductions and dues' remittances, as required under the 1994–1997 contract. By each of these actions, Respondent violated Sections 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

McKenzie Engineering Co. has committed unfair labor practices affecting commerce by withdrawing recognition from Carpenters Local Union 410, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, a statutory labor organization, during the term of a collective-bargaining contract between those parties, by repudiating that contract during its term, by ceasing to make trust fund contributions required by that contract, and by thereafter directly hiring employees and imposing employment terms for them without regard to the terms set forth in that contract, in violation of Section 8(a)(5) and (1) of the Act; by discharging Donald Patterson, Mark Spiekermeier, Fred Arnold Jr., and Steven Perry on November 1, 1995, because they were members of the above-named labor organization and as part of the overall plan to terminate further recognition of that labor organization, in violation of Section 8(a)(3) and (1) of the Act; and, by offering to pay an employee $2 above scale if that employee refrained from joining the above-named labor organization, by gestures which urged an employee not to join the above-named labor organization; by offering an employee $250 to withdraw from the above-named labor organization, by stating that McKenzie Engineering Co. was going to have to go nonunion, and by presenting an employee with an alternative insurance plan to the one provided by the above-named labor organization and saying that McKenzie Engineering Co. would like to do away with the above-named labor organization, in violation of Section 8(a)(1) of the Act.

REMEDY

Having concluded that McKenzie Engineering Co. has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative actions to effectuate the policies of the Act. With respect to the latter, it shall be ordered to, within 14 days from the date of this Order, offer Donald Patterson, Mark Spiekermeier, Steven Perry, and Fred Arnold Jr. full reinstatement, dismissing, if necessary, anyone who may have been hired or assigned to perform their jobs, or if the jobs of one or more of them no longer exists, to substantially equivalent employment, without prejudice to seniority or any other rights or privileges. In addition, within 14 days from the date of this Order, it shall remove from its files any references to their unlawful discharges on November 1, 1995, and, within

3 days thereafter, notify each one of those four employees that this has been done and that his discharge will not be used against him in any way. Further, it shall be ordered to make Patterson, Spiekermeier, Perry, and Arnold whole for any loss of earnings and other benefits suffered as a result of the discrimination directed against them, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

McKenzie Engineering Co. also shall be ordered to recognize and bargain with Carpenters Local Union 410, United Brotherhood of Carpenters and Joiners of America, AFL–CIO for the remainder to the term of the 1994–1997 collective-bargaining contract and any automatic renewal or extension of it. McKenzie Engineering Co. shall be ordered, to the extent requested to do so by that labor organization, to rescind changes in employment terms made on and after November 1, 1995, restoring those employment terms to levels which existed prior to that date; to make whole all employees who worked for it on and after that date for lost wages, calculated in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), and, with regard to fringe benefits, to remit any payments it may owe to those funds, determined in the manner prescribed in *Merryweather Optical Co*., 240 NLRB 1213 (1979), and to reimburse employees for any losses or expenses they may have incurred because of its failure to make payments to those funds, in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1991), with interest on any money owing, to be computed in the manner prescribed in *New Horizons for the Retarded*, supra. See generally *Our Lady of Lourdes Health Center*, 306 NLRB 337 (1992), and *Excel Fire Protection Co.*, 308 NLRB 241, 248 (1992).

[Recommended Order omitted from publication.]